NO. 82-1066

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Appellant*

V.

HARRY PTASYNSKI, *et al.*, *Appellees*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF WYOMING

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QUESTIONS PRESENTED

1. Whether the exclusion of geographically defined categories of Alaska oil from the coverage of Title I of the Crude Oil Windfall Profit Tax Act of 1980 violates the Uniformity Clause of the Constitution, which requires that "Duties, Imposts and Excises shall be uniform throughout the United States."

2. Assuming the answer to Question No. 1 is in the affirmative, whether the proper remedy is to strike Title I in its entirety or to sever the invalid exemption, thereby extending the windfall profit tax to all Alaskan oil.

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BRIEF FOR THE STATE OF TEXAS, APPELLEE

STATEMENT OF THE CASE

This case concerns a challenge to the validity of Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223 (hereinafter the "Act"), on grounds that Sections 4991(b)(3) and 4994(e), which exempt from the tax all crude oil produced north of the Arctic Circle or north of the Alaska-Aleutian Divide and 75 miles or more from the Trans-Alaska Pipeline System, violate article I, section 8, clause 1 of the Constitution (hereinafter the "Uniformity Clause"). The State of Texas has no objection to the explanation of the Act contained in the Statement section of the Brief for the United States. Like the State of Louisiana, however, Texas notes that the federal government's description of the proceedings below de-emphasizes the intervention of the two states.

A more complete explanation of the procedural posture of the States of Texas and Louisiana is presented in the Statement section of the Brief for Louisiana.

SUMMARY OF ARGUMENT

Since the time prior to adoption of the Constitution, the phrase "uniform throughout the United States" as used in the Uniformity Clause has referred strictly to geographical uniformity. That the clause required geographic uniformity only was a ground for complaint at the Constitutional Convention, where it was argued that the uniformity requirement should limit Congress to taxation which was equal in its operation on the several states. *Knowlton v. Moore*, 178 U.S. 41 (1900) (hereinafter "*Knowlton*"). Recognizing that such a restriction would render the grant of taxing power meaningless, the framers of the Constitution rejected the argument advocating such "intrinsic" uniformity. Id. at 108-9.

The purpose of the Uniformity Clause and its requirement of strict geographic uniformity was to prevent discrimination by Congress among the states. Id. at 89; *Downes v. Bidwell*, 182 U.S. 244 (1901). On its face, the Act does not comply with the geographic uniformity requirement of the clause because it makes oil production, the subject of the tax, taxable when it is located in Texas but non-taxable when it is located in portions of Alaska, to the great benefit of Alaska.

The "rational considerations" urged by the federal government as justifying a departure from the rule of strict geographic uniformity deal with intrinsic uniformity, which the authors of the Constitution and the justices of this Court have rejected. There are no universal objects whose taxation would produce an equal effect in every state. Thus, to allow considerations other

than geographic uniformity in applying the Uniformity Clause would, at a minimum, give to Congress the difficult task of weighing the competing interests of the different states as regards the indirect taxes to be imposed on them. The legislative process would be opened to competing groups of states attempting to escape the indirect taxation of favored industries, and the "spirit of jealousy" which the Constitution's framers sought to appease by inclusion of the Uniformity Clause, *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180 (1796), would be encouraged.

Unlike the geographical uniformity requirement of the Uniformity Clause, the uniformity limitation of the Bankruptcy Clause is inherently flexible. See *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co.*, 294 U.S. 648, 668 (1935). The purpose of the Bankruptcy Clause was to encourage commerce by stopping the practice of some states of ignoring discharges in bankruptcies obtained in other states. It was, in fact, inserted in the Constitution immediately after the grant of commerce power, and it should be read in light of the Commerce Clause, which is not limited by the requirement of geographic uniformity. Nadelman, *On the Origin of the Bankruptcy Clause*, 1 AM.J.LEGAL HIST. 215, 227 (1957). The Purpose of the Uniformity Clause, on the other hand, was to restrain factionalism among the states. To weaken the restraints imposed by the geographical uniformity requirement by making it more flexible would defeat the purpose of the clause.

The purpose of the Port Preference Clause was similar to that of the Uniformity Clause: to prevent direct discrimination against the ports of one or more states in favor of the ports of another state. *See Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). If port preference decisions are used to aid in

understanding congressional powers under the Uniformity Clause, they buttress the conclusion that the Alaska exemption is unconstitutional, since the benefit conferred by the Act on Alaska and its discrimination against the State of Texas are both deliberate and direct. That Congress could have conferred this benefit in terms which were not constitutionally infirm is irrelevant. Under the rules of statutory construction, the language of a statute controls when it is sufficiently clear in its context. *Ernst & Ernst v. Hoch Felder,* 425 U.S. 185, 201 (1976); *United States v. Oregon,* 366 U.S. 643, 648 (1961). The language used by Congress to frame the Alaska exemption could not be clearer. The exemption is unlawful.

The general rule for determing whether the unconstitutionality of a statutory provision like the Alaska exemption necessitates the invalidation of the entire act turns on legislative intent. If it is evident from the circumstances surrounding passage of the act that the remainder of the statute would not have been passed in the absence of the invalid sections, the act as a whole must fall. *International Textbook Co. v. Pigg,* 217 U.S. 91, 113 (1910). The legislative history of the Act makes it clear that the remainder of the Act would not have passed in the form finally approved by Congress, had the exempt Alaska oil provision not been included.

Paramount among the concerns of Congress in its consideration of windfall profit tax legislation was the need to reduce dependence on imported crude oil. Members of Congress based their support of the different versions of the windfall profit tax bill on the inclusion of incentives to increase the domestic production necessary to achieve a greater degree of national energy independence. Production incentives were critical to the balance between generating revenue and encouraging domestic exploration and production. The exempt Alaska oil provision was present in every version of the

windfall profit tax legislation and was clearly one of the weightier elements on the incentives side of the balance. Moreover, the Alaska exemption was essential to the compromise which allowed the windfall profit tax bill to progress through the Senate. As a political matter, the taxing provisions would not have survived Senate debate in their present form in the absence of this compromise.

Assuming arguendo that the general separability clause in the Internal Revenue Code, Section 7852(a), applies to the Act, its presence in no way concludes the ultimate decision on severance. A severance clause is "not an inexorable command," *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924), but rather creates a presumption of divisibility which is overcome by considerations showing the inseparability of the statute's provisions or the probability that the legislative body would not have passed the remnant. *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1929). Any presumption which Section 7852(a) may raise is overcome by the facts that the Alaska oil exemption was intrinsic to the Act's balance of production incentives against revenue generation, that similar exemptions were present in every version of the legislation, and that the exemption was critical to the political compromise which sustained the legislation's progress through the Senate into conference.

Severance in this case would work a vast extension in the operation of the tax and disrupt the balance deliberately fixed by Congress, thus infringing improperly on the powers and duties of Congress. The fact that the balance involves revenue-raising considerations does not compel preservation of the tax. *See Marchetti v. United States*, 390 U.S. 39 (1968). As a practical matter, only Congress knows how to assess the competing demands of the U.S. treasury and the nation's need for energy independence. As a constitutional matter, only

Congress is empowered to make this assessment. The Constitutional gives Congress the exclusive power to tax, and there is no authority for imposition of any type of tax by the judiciary.

Judicial legislation is particularly inappropriate where, as here, the challenged statute is extraordinarily complex. *See Untied States v. General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675, 679 (2d Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Unlike the courts, Congress can choose from a multitude of legislative options for curing the statute's constitutional infirmity, which options will take into consideration policy implications and the statutory complexities in changing the operation of the tax. The remedy for this Act should be left to those who drafted and passed it and whose legitimate range of actions is most flexible.

ARGUMENT

I. THE WINDFALL PROFIT TAX VIOLATES THE UNIFORMITY CLAUSE OF THE CONSTITUTION.

The State of Texas has challenged the validity of the Windfall Profit Tax because this excise tax discriminates against Texas and in so doing violates the Uniformity Clause of the Constitution.

This Court has defined the requirement of uniformity that is found in article 1, section 8, clause 1 in terms of geographic uniformity. The brief submitted to this Court by the United States evidences either a misunderstanding of what this Court has meant by geographic uniformity or a desire to alter the traditional meaning in order to save an otherwise unconstitutional statute. The interpretation of geographic uniformity that has been applied by this Court in the past is the meaning that the authors of the Constitution intended.

It prevents the type of discrimination that the windfall profit tax now works against Texas.

The most authoritative case on the Uniformity Clause is *Knowlton v. Moore*, 178 U.S. 41 (1900) (hereinafter "*Knowlton*"). An evaluation of the Clause and its interpretation by this Court must begin with an analysis of this case.

A. This Court's interpretation of geographic uniformity renders the Act unconstitutional.

In *Knowlton*, the executors of the estate of Edwin F. Knowlton challenged the inheritance tax included in the War Revenue Act of 1898. They argued that the tax was lacking in uniformity because it exempted legacies and distributive shares in personal property in amounts less than $10,000, classified the rate of tax according to the decedent's relationship to the legatee or distributee, and provided for a rate of tax graded according to the amount of the legacy or share. It was contended that the impact of the War Revenue Act was lacking in geographic uniformity and as synonymous with the expression — to operate generally throughout the states.

In rejecting the challenge to the inheritance tax, this Court found that geographic uniformity does not require that the object of the tax must exist with uniformity in the several states. Taxes are uniform in the constitutional sense when they operate generally throughout the United States and uniformly wherever the subjects of the tax are found. The detailed opinion of this Court in *Knowlton* explains that, both prior to the adoption of the Constitution and at the time of the Constitutional Convention, the phrase "uniform throughout the United States" was used "with reference purely to a geographical uniformity and as synonymous with the expression — to operate generally throughout the

United States.'" *Id.* at 96, 98. In drafting the Uniformity Clause, the authors of the Constitution struck out the words "and equal" after the word "uniform" because they wanted to "prevent the implication that the duties, imports, and excises which were to be uniform throughout the Untied States were to be placed upon rights equally existing in the several states." *Id.* at 109. The phrase "and equal" was eliminated so that taxes did not have to have an equal effect in each state in order to be constitutionally uniform. *Id.* at 104.

The use of the words "uniform throughout the United States" as meaning only geographic uniformity is apparent from the proceedings of the Continental Congress. *Id.* at 96. Upon one occasion, the opposition to a proposed tax on imported salt took the form of arguments that the tax would bear injuriously on eastern states because their fisheries used the salt. *Id.* at 99. The belief that uniform indirect taxes would not result in equality of taxation is also illustrated by Rhode Island's opposition to a resolution recommending to the several states that Congress be vested with the power to levy certain taxes upon imported goods. Rhode Island protested against this power on the ground that the taxes would be unequal in their operation, bearing more heavily upon the commercial states, and pressing with greatest severity upon Rhode Island, the state that drew its chief support from commerce. *Id.* at 99-100

That the Uniformity Clause required only geographic uniformity was understood by the Constitutional Convention. When it met in Philadelphia in 1787, it avoided any implication that duties, imposts, and excises were only to be placed upon rights "equally existing" in the several states. *Id.* at 109. Later, those who opposed the ratification of the Constitution knew that the Uniformity Clause imposed only geographic uniformity, and they made this a distinct ground of complaint. *Id.* at 106.

The requirement that indirect taxation be limited to objects "existing in equal quantity in the several states" was rejected by the Convention because it would render the grant of power to tax a failure. *Id.* at 108-9. No such universal objects of taxation were or are in existence in the states. Moreover, the inability of Congress to give equal effect to duties, imports, and excises is well established. As this Court has stated,

> *Congress cannot* accommodate its legislation to the conflicting or dissimilar laws of the several states, nor *control the diverse conditions to be found in the various states, which necessarily work unlike results from the enforcement of the same tax.* All the Constitution (article l, §8, cl. l) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States.

Florida v. Mellon, 273 U.S. 12, 17 (1927). (emphasis added).

The indirect taxes that are subject to the Uniformity Clause will always have an unequal effect among the states. This is true whether it is a salt tax which bears heavily on the fisheries of the eastern states, or a tax that burdens the commerce of Rhode Island, or an oil tax which bears heavily on the Alaskan oil industry.

The decisions of this Court after *Knowlton* continued to interpret the Uniformity Clause solely in terms of geographic uniformity. They state that the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is geographic, or as it is sometimes called, territorial uniformity. *La Belle Iron Works v. United States*, 256 U.S. 377, 392 (1921); *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1, 24 (1916); *Billings v. United States*, 232 U.S. 261, 282 (1914).

Thus, questions of intrinsic uniformity, which deal with the necessity of taxes having an equal effect in each state, are irrelevant for the purposes of the Uniformity Clause cases. The Brief for the United States erroneously assumes that an alleged attempt by Congress to give taxation an equal effect in all states, such as the exemption from taxation of crude oil production from a geographically designated area of the United States, satisfies the requirement of the Uniformity Clause. Equalizing the effect of taxation has nothing to do with the requirement of geographic uniformity. In *Knowlton*, it was explained that the purpose of the Uniformity Clause and its requirement of geographical uniformity was to prevent discrimination among the states.

> Giving to the term *uniformity* as applied to duties, imposts, and excises *a geographical significance*, likewise *causes that provision to look to the forbidding of discrimination as between the states*, by the levying of duties, imposts, or excises upon a particular subject in one state and a different duty, impost, or excise on the same subject in another. . . .

Knowlton at 89. (emphasis added).
The Court concluded that "the possible discrimination against one or more states was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts and excises." *Id.*

By the terms of the Act, "exempt Alaskan oil," a classification drawn strictly in terms of geography, is relieved from the burden of the windfall profit tax. *See* 26 U.S.C. §§4991(b)(3), 4994(e) (Supp. 1981). As the federal government has emphasized, this exemption was made because of the high exploration, production, and transportation costs in the exempt area. *See* Brief for the United States at 15, 19, 29-30. High exploration, production, and transportation costs are not, however, unique to the geographic area designated by Congress in

the Alaska exemption. Offshore gas production from Texas submerged lands, which yields condensate subject to the windfall profit tax, is much more costly than production from uplands. For example, Atlantic Richfield Company recently announced plans to drill a 23,000 foot test well on Texas submerged lands with estimated dry hole costs of $30 million. If the well is completed, estimated additional costs will be $20 million. *See* Appendix A. Yet Congress did not give Texas a tax exemption for production from submerged lands subject to the State's control. The Act on its face does not comply with geographic uniformity requirements of the Uniformity Clause because it makes oil production, the subject of the tax, taxable when it is located in Texas but non-taxable when it is located in portions of Alaska, to the great benefit of Alaska. If this Court upholds the Alaska exemption, it will be an amazingly short time before the Texas delegation in Congress begins pressing for comparable geographic exemptions for Texas production.

The basic error in the argument of the United States is that it ignores the fact that the Uniformity Clause deals solely with geographic uniformity, which concerns discrimination by Congress against one or more states. In its brief, the United States argues that the exclusion from taxation of production from certain geographically defined areas in Alaska and on the Outer Continental Shelf is not a violation of the geographic uniformity requirement of the clause because the exclusions are supported by a "rational basis" or "rational considerations" or "reasonable grounds." Brief for the United States at 27, 31, 32, 33. Such considerations have nothing to do with geographic uniformity. They deal with "intrinsic" uniformity which concerns the equal effect of taxes in each state. They are issues that are irrelevant in Uniformity Clause litigation.

To take into consideration any factors besides geographic uniformity is to invite disaster. Since there are no universal objects whose taxation would produce an equal effect in all fifty states, Congress would have to embark on the very difficult task of weighing the competing interests of the various states as regards the indirect taxes to be imposed on them. Thus, if Congress were to attempt to equalize the effect of oil excise taxes in Texas and Alaska, it would have to find some way to analyze the extra costs of the gas production off the Texas coast, which yields taxable condensate, and then measure those costs against the expenditures required in the area subject to the Alaska exemption. Similar analysis would have to be done in other geographic areas of the nation. This is precisely the type of task which would be required if Congress is permitted, as the federal government urges, to enact exceptions supported by a "rational basis" or "rational considerations" or "reasonable grounds." Brief for the United States at 27, 31, 32, 33.

The federal government argues that geographic uniformity has not been violated because "substantial congressional majorities (including members from oil producing states) recognized and chose to accommodate the special circumstances confined to a limited geographic area within one state." Brief for the United States at 9. It should be remembered that the Uniformity Clause "look[s] to the forbidding of discrimination as between the states." *Knowlton* at 89. Furthermore, in *Downes v. Bidwell*, 182 U.S. 244 (1901), this Court explained that the purpose of the Uniformity Clause "was to protect the states which united in forming the Constitution from discriminations by *Congress*, which would operate unfairly or injuriously upon some states and not equally upon others." *Id.* at 278 (emphasis added). It matters not whether the geographic discrimination is made by congressional majorities in favor of a minority. It is any discrimination made by Congress on a geographic basis which is prohibited.

The argument of the United States assumes that once the barrier of geographic uniformity has been removed, the majorities in Congress will always act selflessly in the best interests of the country. This argument assumes that no bargains will be struck and that there will be no discrimination among the states as various industries and interest groups attempt to elude the burden placed on them by indirect taxes. As can be seen from the discussion of the origin of the Uniformity Clause that is found in *Knowlton*, the authors of the Constitution had some doubts about the selflessness of the members of Congress and their ability to always refrain from favoring some states at the expense of others. When this Court first had the opportunity to consider the Uniformity Clause, it noted that if apportionment was the standard that had to be applied, the result would be:

> . . . intricate and endless valuations and assessments, in which everything will be arbitrary, and nothing certain. There will be no rule to walk by. The rule of uniformity, on the contrary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such a case, the object and the sum coincide, the rule and the thing unite, and of course there can be no imposition. The truth is that the articles taxed in one state should be taxed in another; in this way the spirit of jealousy is appeased, and tranquility preserved. . . .

Hylton v. United States, 3 U.S. (3 Dall.) 171, 180 (1796).

In addition to the fact that the elimination of geographic uniformity would expose the nation to the spectacle of competing groups of states attempting to escape the indirect taxation of favored industries, as a practical matter, destruction of geographic uniformity would not result in any greater equality in the effect of

indirect taxes on the states. "Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this Court has said more than once. *State Railroad Tax Cases*, 92 U.S. 612." *Edye v. Robertson*, 112 U.S. 580, 595 (1884) (the *Head Money Cases*).

The arbitrary nature of the Alaska exemption is clear because similar exemptions have not been given to other geographic areas of the United States where the costs of the oil business are greater than usual. If the Alaska exemption is validated by this Court, then that will encourage "the spirit of jealousy" and will encourage discrimination between the states. If the Alaska exemption does not prove to be susceptible to the requirements of geographic uniformity, can anyone doubt that the Congressional delegations of the various states will fail to be made aware of the preference successfully given to the State of Alaska?

B. The decisions of this Court in cases involving either the Bankruptcy Clause or the Port Preference Clause do not alter the fact that the exempt Alaska oil provision is an unconstitutional violation of the Uniformity Clause.

Article 1, section 8, clause 4 of the Constitution gives Congress the power to establish "uniform laws on the subject of Bankruptcies throughout the United States." In its Brief, the federal government cites *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (hereinafter the "*3R Act Cases*"), which was decided under the Bankruptcy Clause, for the proposition that an excise tax can be constitutional even though it does not comply with the requirement of geographic uniformity that is found in the Uniformity Clause. Brief for the United States at 35.

The language from the *3R Act Cases* that the government would like to have made applicable to the Uniformity Clause is the statement that the Bankruptcy Clause "uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Id.* at 159. Although this Court did state that its construction of the Bankruptcy Clause comports with its construction of other "uniform" provisions of the Constitution, *id.* at 160, the origin of the Bankruptcy Clause and its construction by this Court have been such that the interpretation of the bankruptcy uniformity requirement in the *3R Act Cases* should not be applied to the Uniformity Clause.

In the *3R Act Cases*, the argument was made that the uniformity required by the Bankruptcy Clause was "geographic." *Id.* at 158. As the federal government notes (*see* Brief for the United States at 35), this argument was rejected by this Court as being "without merit because it overlooks the flexibility inherent" in the Bankruptcy Clause. *3R Act Cases* at 158. The inherent flexibility of the Bankruptcy Clause has its origin in the unique history of that provision and distinguishes it from the Uniformity Clause and its geographic uniformity requirement.

The uniformity requirement of the Bankruptcy Clause was placed in the Constitution by its authors to stop the practice, which was common under the Articles of Confederation, by which some states ignored discharges in bankruptcy obtained in other states. Nadelman, *On the Origin of the Bankruptcy Clause,* 1 AM. J. LEGAL HIST. 215, 224-25 (1957). Thus, the reason for including the Bankruptcy Clause links it inextricably to the commerce powers. Indeed, at the Constitutional Convention, the Committee on style inserted the Bankruptcy Clause immediately after the power to regulate commerce. It

seems unavoidable that the Committee intended that the Bankruptcy Clause should be read in light of the Commerce Clause. *Id.* at 227. Also, James Madison, who perhaps more than any other man was the author of the Constitution, recognized the close relationship that existed between the Bankruptcy and Commerce Clauses. He wrote that "*[t]he power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce*, and will prevent so many frauds where the parties or their property may lie or be removed into different states, that the expediency of it seems not likely to be drawn in question." THE FEDERALIST, No. 42, at 266 (J. Madison) (Lodge ed. 1888) (emphasis added).

The close relationship between the Commerce and Bankruptcy Clauses is important, because the federal government's exercise of its authority under the Commerce Clause is not limited by the requirement of national or geographic uniformity. *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616 (1950); *Currin v. Wallace*, 306 U.S. 1 (1939); *United States v. Hawes*, 529 F.2d 472, 477 (5th Cir. 1976). As a result, the bankruptcy uniformity clause has been accorded greater flexibility than has the uniformity requirement for excise taxes. "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect to the operation of the bankruptcy power." *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co.*, 294 U.S. 648, 668 (1935). Even in this Court's first encounter with the Bankruptcy Clause, Chief Justice Marshall recognized the flexibility that is inherent in this Clause. He wrote that

> [t]he bankrupt law is said to grow out of the exigencies of *commerce*, and to be applicable solely to traders; but it is not easy to say who must

> be excluded from, or may be included within, this description. It is, like every other part of the subject, *one on which the legislature may exercise an extensive discretion.*

Sturges v. Crowninshield, 17 U.S. (4 Wheat) 122, 195 (1819) (emphasis added.)

Unlike the power granted by the Bankruptcy Clause, the taxing power is independent of the Commerce Clause. The "power of Congress to tax is a very extensive power." *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1866). The taxing power is granted in the Constitution with only one exception and only two qualifications, the exception being the prohibition preventing taxes on exports, and the qualifications being the requirements of apportionment for direct taxes and uniformity for indirect taxes. *Id.* "More comprehensive words could not have been used." *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869). In contrast to the Bankruptcy Clause, with its close connection to the commerce power, the Uniformity Clause has had as its objective not the encouragement of commerce, but the restraint of the factionalism that is inherent among the states. To weaken or eliminate the restraints imposed by the geographic uniformity requirement of the Uniformity Clause by giving it a "flexible" interpretation would be to destroy the whole purpose of this clause. To allow a "progressive liberalization" of the geographic uniformity requirement would only serve to excite the Congressional delegations of the various states and encourage an unseemly scramble for advantage. The federal government is thus wrong in suggesting that the more flexible uniformity requirements of the Bankruptcy Clause are comparable to the geographic uniformity requirement of the Uniformity Clause.

Furthermore, this Court's analysis in the recent case of *Railway Labor Executives' Association v. Gibbons*,

455 U.S. 457 (1982), shows that even the "flexible" uniformity requirement of the Bankruptcy Clause does not permit one part of the country to receive favored treatment not accorded to the other parts of the Union. This Court wrote that

> [i]n the *3R Act Cases*, we upheld Congress' response to the existing rail transportation crisis in the Northeast. Since no railroad reorganization proceeding was then pending outside of the region defined by the Regional Railroad Reorganization Act (3R Act), 87 Stat. 985, 45 U.S.C. §701 et seq., the Act in fact operated uniformly upon all railroads then in bankruptcy proceedings.

Id. at 1176-77.

It is therefore incorrect for the government to assert that the geographic uniformity requirement for excise taxes can be ignored because of this Court's recognition of the "flexibility inherent" in the Bankruptcy Clause. Such an argument does violence to the interpretations of the Uniformity Clause of this Court and ignores the substantial difference between this latter clause and the Bankruptcy Clause in both purpose and effect.

The federal government also attempts to attack the geographic uniformity requirement of the Uniformity Clause by citing opinions of this Court that interpret the Port Preference Clause. The Port Preference Clause is set out at article 1, section 9, clause 6 as follows: "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties to another."

Instead of weakening the requirement of geographic uniformity that is found in the Uniformity Clause, the

cases decided pursuant to the Port Preference Clause establish that the authors of the Constitution, and later this Court, have consistently regarded the latter two clauses as important and necessary barriers to discrimination between the states. The federal government argues that the prohibitions of the Port Preference Clause do not work to prevent discriminations as long as there is no "systematic" discrimination in favor of, or against, the commerce of a particular state or states. Brief for the United States at 38-39. The federal government further argues that this same standard applies to Uniformity Clause cases as well. The State of Texas believes that the Act does work a systematic discrimination against expensive, hard-to-produce oil in the State of Texas. Moreover, an analysis of the Port Preference Clause cases reveals that this Court has analyzed those discriminations not in terms of whether or not they are "systematic," but rather, in terms of the *direct or incidental advantages* that result to the states from legislation. Direct discrimination against a state or states is prohibited by the Port Preference Clause.

In the recent case of *City of Houston v. Federal Aviation Administration*, 679 F.2d 1184, 1196-98 (5th Cir. 1982), the Fifth Circuit noted that the "authoritative" case on the Port Preference Clause is *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). There, this Court explained what discriminations against the states were permitted by the Port Preference Clause and what discriminations were prohibited. It stated that:

> [t]here are many Acts of Congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one state and which very advantage may incidentally operate to the prejudice of ports in a neighboring state, which have never been supposed to conflict with this limitation

> upon its power. . . . *It will not do to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld, if it appears, or can be shown, that the effect and operation of the law may incidentally extend beyond the limitation of the power.* Upon any such interpretation, the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise. . . . Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular state over those of another. Indeed, *the clause, in terms, seems to import a prohibition against some positive legislation by Congress to this effect, and not against any incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce,* and confessedly within its power. . . . *The truth seems to be, that what is forbidden is not, discrimination between individual ports within the same or different states, but discrimination between states;* and if so, in order to bring this case within the prohibition, it is necessary to show, not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.

Id. at 433-35 (emphasis added).

The Port Preference Clause does not render legislation unconstitutional if the statute incidentally discriminates against a state or states. Later Port Preference decisions of this Court reaffirm the continued validity of the direct versus indirect discrimination analysis. *See, e.g., South Carolina v. Georgia,* 93 U.S. 4 (1876).

The error in the government's analysis of the Port Preference Clause is also illustrated by its interpretation of *Louisiana Public Service Commission v. Texas & N.O. Railway Co.*, 284 U.S. 125 (1931). *See* Brief for the United States at 37. In this case, the Interstate Commerce Commission set rates for the transportation of sand, gravel, and other commodities in Arkansas, Oklahoma, Texas, and that part of Louisiana west of the Mississippi, including certain points on the east bank of the river. The rates were made applicable to interstate and intrastate transportation and included a provision for a rate of eight cents per ton for ferrying such of the traffic as crossed the Mississippi. The Louisiana Public Service Commission sought to have the rates annuled on the grounds "that the inclusion of the allowance for ferrying the Mississippi gives preference to Galveston, Houston, and other ports of Texas over New Orleans and Baton Rouge in Louisiana in violation of the Constitution, article 1, §9, cl. 6." *Id.* at 130. The federal government cites the Court's rejection of the claim of the Louisiana Service Commission for the proposition that the Port Preference Clause accords "Congress considerable latitude in drawing distinctions between particular ports of different states." Brief for the United States at 37. Such a reading of the case is too broad because it ignores the distinction this Court has made as regards direct versus indirect discrimination: "Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which *incidentally* result to the disadvantage of other ports in the same or neighboring states." *Id.* at 131 (emphasis added). Certain laws can discriminate against some ports, but only if such discrimination is incidental to the proper exercise by Congress of other powers.

If, as the government claims, the decisions interpreting the Port Preference Clause should be used as an aid in understanding the Congress' powers under the

Uniformity Clause, the direct versus indirect discrimination analysis of the port preference cases only confirms the conclusion that the Alaska exemption is unconstitutional. In exempting large portions of Alaska from the windfall profit tax, Congress directly favored Alaska at the expense of other states. Not even the federal government can claim that there was anything incidental about the discrimination against the other states of the Union.

C. An excise tax exemption that violates the requirement of geographic uniformity is unconstitutional whether or not Congress could have defined the exempted class in terms that were not constitutionally infirm.

The government argues that the exempt Alaska oil provision is not a violation of the Uniformity Clause because Congress might have expressed it in a way that does not violate the requirements of geographic uniformity. Brief for the United States at 10, 30. Such an argument ignores the most basic rules of statutory construction.

The language of a statute controls when sufficiently clear in its context. *Ernst & Ernst v. Hoch Felder*, 425 U.S. 185, 201 (1976); *United States v. Oregon*, 366 U.S. 643, 648 (1961). "It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed. . . ." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

The intent of Congress as to the Alaska exemption of the Act could not have been clearer. The exemption shows that the Congress intended that a portion of Alaska receive an excise tax exemption that was not to be extended to any other parts of the United States. As the government admits, "There can, of course, be no dispute that the exemption here at issue is geographically defined so as to exclude oil located in all of the 50

states except portions of Alaska." Brief for the United States at 28. Such an intent is a violation of the Uniformity Clause, and any alternative language that Congress might have used is now irrelevant.

Understandably, the federal government would like the Alaska exemption to be construed in terms of some vague considerations of what might have been, rather than have to deal with the actual language of the statute. Nevertheless, the rules of statutory construction are plain. The language of the statute is of primary importance when interpreting its provisions. As a result, an analysis of the Act must be based on the clear language in the statute and not on some other formulation that Congress might have enacted.

II. THE INTENT OF CONGRESS AS EXPRESSED IN THE LEGISLATIVE HISTORY OF THE ACT AND THE PROHIBITION AGAINST JUDICIAL LEGISLATION REQUIRE THAT THE ACT IN ITS ENTIRETY MUST FALL.

A. Legislative history makes it clear that the Alaska oil exemption was intrinsic to the Act's balance of production incentives against revenue raising, that similar exemptions were present in all versions of the windfall profit tax legislation, and that inclusion of the Alaska exemption was critical to the political compromise that resulted in passage of the Act as it exists today.

The general rule for determining whether the unconstitutionality of certain statutory provisions makes necessary the invalidation of the entire act is stated in *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902): "If an obnoxious section is of such import that

the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." Thus, the provisions not held invalid should not be allowed to stand if their separate enforcement would not accomplish "the manifest intent of the legislature." *International Textbook Co. v. Pigg*, 217 U.S. 91, 113 (1910) (hereinafter "*International Textbook Co.*"). The ascertainment of legislative intent lies in an examination of the circumstances surrounding passage of the act, including the history of the act, its context, and the object sought by the legislative body. *See* 2 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §44.03 (C. Dallas Sands 4th ed. 1973). If an examination of legislative intent shows that the invalid provisions of the act

> ...are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.

International Textbook Co. at 113, quoting *Warren v. Mayor*, 68 Mass. (2 Gray) 84 (1854). More simply put, if it is evident that the constitutional provisions would not have been passed in the absence of the invalid sections, the act as a whole must fall.

The court below found that "it is . . . clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision." Memorandum Opinion at 11 (reproduced at J.S.

9a). A review of the legislative history confirms the district court's conclusion. Paramount in the concerns of Congress was the need to reduce dependence on foreign crude oil. *See e.g.* 126 Cong. Rec. S2825 (daily ed. Mar. 21, 1980) (remarks of Sen. Schmitt); *id.* at S2848 (daily ed. Mar. 24, 1980) (remarks of Sen. Bellmon); *id.* at S2849 (remarks of Sen. Helms); *id.* at S2855 (remarks of Sen. Baucus); *id.* at S2705 (daily ed. Mar. 20, 1980) (remarks of Sen. Bentsen). The Senate Finance Committee Report made it clear that the solution to the energy problem lay not in taxing energy production, but in decreasing energy consumption and increasing domestic production, and that the Committee bill's program of energy incentives was designed to meet these goals. S. Rep. No. 394, 96th Cong., 2d Sess. 7, *reprinted* in 1980 U.S. Code Cong. & Ad. News 410, 418. Indeed, the legislative history reflects that members of Congress based their support of the various versions of the windfall profit tax bill which appeared during its 10-month Congressional evolution on the inclusion of incentives to increase the domestic production necessary to achieve a greater degree of national energy independence. *See, e.g.*, 126 Cong. Rec. S3026 (daily ed. Mar. 26, 1980) (remarks of Sen. Hayakawa); *id.* at S3035 (remarks of Senators Dole and Thurmond); *id.* at S3053 (remarks of Sen. Harry F. Byrd, Jr.); *id.* at S2856 (daily ed. Mar. 24, 1980) (remarks of Sen. Baucus); *id.* at S2710 (daily ed. Mar. 20, 1980) (remarks of Sen. Dole); *id.* at S2769 (remarks of Sen. Stevens); *id.* at S3029 (daily ed. Mar. 26, 1980) (remarks of Sen. Javits).

It is also evident that Congress found inclusion of production incentives to be not merely desirable, but rather, critical to the balance between generating revenue and encouraging domestic exploration and development. The report on the House Ways and Means Committee bill, which exempted Alaskan oil other than Sadlerochit reserves produced north of the Artic Circle, stated that a heavier tax on Tier 1 and Tier 2 oil and

more lenient treatment of other categories of oil, including Alaskan production, struck "the appropriate balance between revenue needs and production incentives." H.R. Rep. No. 304, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. Code Cong. & Ad. News 587, 600. Senator Long's introduction of the conference report on the bill to the Senate emphasized that the proposal "must balance conflicting considerations of revenue on the one hand and production incentives on the other," and that the conference agreement, which set forth the Act as passed by both the House and the Senate, was "an effective compromise of these competing considerations." 126 Cong. Rec. S2610 (daily ed. Mar. 19, 1980). The discussion of the conference bill which followed shows that the conferees were "continually" mindful of the need for greater domestic production incentives. *Id.* at S2630 (remarks of Sen. Gravel).

The conference compromise was achieved in part by retention of "special incentives for the production of newly discovered, incremental tertiary and heavy oil" and lower tax rates for a portion of independent producer production. *See* 126 Cong. Rec. S2610 (daily ed. Mar. 19, 1980). In addition, to encourage exploration and development only in Alaska, the conference exempted new production north of the Arctic Circle and production from the northerly side of the Alaska-Aleutian Divide and 75 miles or more from the Trans-Alaska Pipeline System. *Id.* at S2630.

Clearly, the exempt Alaska oil provision was one of the weightier elements balancing incentives for domestic production against revenue considerations in the version of the Act which Congress finally approved. From the time of the earliest considerations of proposed windfall profit legislation, Congress was aware of the importance of existing and future Alaskan production to the nation's energy future. As of July 1979, the U.S.

Geological Survey estimated that over 30 percent of remaining potential domestic discoveries were located in Alaska. Congress was told that Alaska has more proven oil reserves than any other state, and that, in terms of volume, Alaskan production ranked second behind that of Texas. Witnesses before Congressional hearings testified to the harsh climatic conditions and transportation problems which have resulted in the large investments, long lead times, and high risk which characterize Alaskan exploration and production.[1] *See Hearings on H.R. 3919 Before the Senate Comm. on Finance*, 96th Cong., 1st Sess. (1979) (statements of Thomas K. Williams and W. T. Slick). The Joint Explanatory Statement of the Committee of Conference emphasized that the exemption of Alaskan oil production reflected the conferees' concern that taxation of this production would discourage exploration and production. H. Conf. Rep. No. 817, 96th Cong., 2d Sess. 103, *reprinted in* 1980 U.S. Code Cong. & Ad. News 642, 656. So significant was this exemption as an offset to the disincentive effect of the taxing provisions, that extension of the tax to the Alaskan oil which Congress specifically intended to exempt would certainly frustrate and in fact negate the intricate balancing of purposes struck by Congress.

There is strong authority for denial of severance where separate enforcement of the valid provisions of an act would, as in the instant case, enlarge its scope or operation. In *Davis v. Wallace*, 257 U.S. 478 (1922), the Court held an exemption from a state excise tax invalid. Ruling that the tax as a whole must fall, the Court stated that

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1. Large investments and high risk are not, however, unique to Alaska. *See* description of exploration of and production from Texas submerged lands, *supra* at p. 11.

> [h]ere the excepting provision was in the statute when it was enacted, and there can be no doubt that the Legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the state; and no other authority is competent to give them a larger application.

Id. at 484-5; *see also McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

A review of the origin and evolution of the Alaska oil exemption and the political negotiations which led to its inclusion in the Senate bill makes it evident that there was continuous support for the exemption and that, without approval of the exemption, the Act would have been further stalled in Congress, and the other provisions would not have passed in their present form. The Administration bill contained an exemption for all North Slope production and other production transported through the Trans-Alaska Pipeline System. H.R. Doc. No. 96-107, 96th Cong., 1st Sess., *Windfall Profits Tax and Energy Security Trust Fund: Message from the President of the United States* 3 (1979). The House Ways and Means Committee bill exempted Alaskan oil produced north of the Arctic Circle other than oil from the Sadlerochit Reservoir, which was already in production. H.R. Rep. No. 304, 96th Cong., 1st Sess. 30, *reprinted in* 1980 U.S. Code Cong. & Ad. News 586, 612-13. The Senate Finance Committee bill provided for exemption of all newly discovered oil, which category included Alaska production other than Sadlerochit oil. S. Rep. No. 394, 96th Cong., lst Sess. 35-37, *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 444-6. The Senate debated the tax bill from

November 15, 1979, until December 14, 1979. Comments in the official record allude to lengthy negotiations between senators promoting taxation of newly discovered oil and those favoring retention of the exemption, at least as to Alaska production. *See, e.g.*, 125 Cong. Rec. S17707 (daily ed. Dec. 4, 1979) (remarks of Sen. Byrd). Despite these intense negotiations, the debate was plagued by actual and threatened delay tactics. *Id.* (remarks of Senators Stevens and Byrd). Senator Stevens of Alaska, the acting minority leader, played a significant role in the behind-the-scenes discussions leading to a compromise amendment which applied the tax to newly discovered oil (including newly discovered oil produced in Texas) but exempted newly discovered oil produced north of the Arctic Circle. *See id.* at S18564, 18566 (daily ed. Dec. 14, 1979). Stating his reluctant approval of the compromise, Senator Stevens indicated flat opposition to any additional amendment increasing the tax on Alaska oil. *Id.* at S18565. It is a political reality that in the absence of the compromise supported by Senator Stevens, the taxing provisions would not have survived Senate debate in the form in which they were finally approved by Congress. [2]

The federal government has pointed to the presence of a general separability clause in the Internal Revenue Code, Section 7852(a), in urging severance of the invalid

2. The federal government claims error in the suggestion "that the Alaska oil exemption was the price to obtain the support of the Alaska representatives" (Brief for the United States at 46-47, n.42), since Senator Stevens voted against passage of the Act. As explained above and in the Motion of Taxpayer and Association Appellees to Affirm at 25-27, the key to Senator Stevens' role lay not in his vote on the conference bill, but in his ability to further delay the vote on the Senate Finance Committee bill, his contributions to the compromise amendment to that bill, and, finally, his vote approving the amended bill "in order to give the Senators who represented us in conference the strongest possible position on the bill in conference." 126 Cong. Rec. S2769 (daily ed. Mar. 20, 1980).

Alaska oil exemption. *See* Brief for the United States at 47-48. Assuming arguendo that Section 7852(a) applies to the Act, the court below properly recognized that the presence or absence of such a provision in no way concludes the ultimate decision on severance, and that that decision requires interpretation of legislative intent. [3] Memorandum Opinion at 11 (reproduced at J.S. 8a). The presence of a separability clause merely aids in the determination of legislative intent; it is "not an inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). At most, a statutory declaration creates a presumption of divisibility. This presumption is overcome by considerations making evident the inseparability of the act's provisions or the probability that the legislative body would have been dissatisfied with the remnant. *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1929). *See also Carter v. Carter Coal Co.*, 298 U.S. 238, 312-13 (1936). Thus, even if Section 7852(a) applies, it is again legislative intent which controls. The presumption the general severability clause may raise is overcome by the facts that the Alaska oil exemption was intrinsic to the Act's balance of production incentives against taxing provisions, that similar exemptions were

3. Citing *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971) (hereinafter "*Griffin*"), the federal government suggests that the district court's reliance on legislative intent to make its determination as to severability is in accordance with precedent of "an earlier era" which the Court has rejected. Brief for the United States at 48-49. That legislative intent is still the primary determinative is evident in the recent decision of *Zobel v. Williams*, ______U.S.______, 102 S.Ct. 2309, 2315 (1982). The "rigid separability rule" (Brief for the United States at 48) cited by the federal government and to which *Griffin* referred was the rule that a party challenging a statute's validity could prevail by showing that the statute was unconstitutional in its application to persons other than the party or to circumstances other than those of the party. *See Griffin* at 104 and *United States v. Raines*, 362 U.S. 17, 21-23 (1960).

present in every version of windfall profit tax legislation, and that inclusion of the Alaska exemption was critical to the political compromise which sustained the legislation's progress through the Senate into conference.

The federal government's assertion that "Congress was fully aware . . . that if the Alaska oil exemption were held invalid the exemption would be severed" (Brief for the United States at 46) is based on Senator Long's isolated comment that the tax would extend to oil covered by the Alaskan exemption should the courts hold the exemption invalid. 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980). It does not follow from Senator Long's statement that his interpretation is correct or that it indicates the view of the entire Congress. *American Smelting & R. Co. v. Occupational Safety and Health Review Commission*, 501 F.2d 504 (8th Cir. 1974). There was neither debate nor vote on the issue of separability. Thus, although Senator Long was floor manager of the bill in the Senate, his remarks are not entitled to the weight which is accorded references to agreement among the sponsors and supporters of the legislation. *Cf. United States v. Dean*, 647 F.2d 779, 787 n.15 (8th Cir. 1981), *cert. denied*, _____ U.S. _____, 102 S.Ct. 2296 (1982). Indeed, Senator Long acknowledged that a tax on newly discovered Alaskan oil was contrary to the will of Congress when he hastened to voice his expectation that the Senate would act to remedy any judicial extension of the tax to all Alaskan oil. *See* 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980).

B. Congress alone has the constitutional authority and the range of options required to take into account, in extension or modification of the tax, policy implications and the impact on the complexities of the windfall profit taxation system.

The district court found an additional basis for its denial of severance, holding that extension of the tax to all oil produced in Alaska would be an impermissible infringement on the powers and duties of Congress. *See* Memorandum Opinion at 12 (reproduced at J. S. 9a-10a). The reliance of the court below on the prohibition against judicial legislation was proper, since severance would work a vast extension in the operation of the tax and disrupt the balance which Congress deliberately sought between the objectives of revenue-generation and enhancement of domestic production. This Court has held that it is proper to strike an excise tax in its entirety if an exemption is unconstitutional, and that no authority other than the legislature is competent to expand the operation of such a tax. *Davis v. Wallace*, 257 U.S. at 484-85. Moreover, the presence of a general separability clause does not empower a court "to rewrite the substantive provisions" of an act, "a function properly left to the [legislative body]." *U.T. Inc. v. Brown*, 457 F. Supp. 163, 170 (W.D.N.C. 1978). Similarly, where judicial intervention other than severance is sought, courts have been reluctant to upset the balance among interests deliberately fixed by Congress, since balancing is a legislative rather than a judicial function. *See District of Columbia National Bank v. District of Columbia*, 348 F.2d 808, 810 (D.C. Cir. 1965).

The fact that the balance involves revenue-raising considerations does not compel preservation of the tax. In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court held that those who properly asserted the privilege against self-incrimination could not be criminally punished for failure to comply with the registration provisions of a federal wagering tax. The Court was urged to allow continued enforcement of the registration and tax provisions by putting restrictions on the use of information gathered under registration requirements.

The Court stated that it was plain from the face of the wagering-tax system that Congress intended that information collected under the system was to be furnished to interested prosecuting authorities, and that it must assume that imposition of use-restrictions would frustrate a significant Congressional purpose. The Court explained its decision that judicially-imposed use-restrictions would be improper as follows: "We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values." *Id.* at 59-60. In the case of the Act, it is clear from the legislative history that Congress intended to promote energy self-sufficiency by encouraging domestic exploration and production. As a practical matter, it is Congress alone who knows how to assess the competing demands of production enhancement and the U.S. Treasury, and, as a constitutional matter, it is Congress alone that is empowered to make this assessment.

The Constitution of the United States unequivocally gives to Congress the exclusive power to tax. Article 1, section 7, clause 1 provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Article 1, section 8, clause 1 grants Congress the power to lay and collect taxes, duties, imposts, and excises. Finally, the sixteenth amendment gives to Congress the power to lay and collect income taxes. There is no constitutional authority for imposition of any type of tax by the judiciary. Congress is, within the limits of the Constitution, supreme in its ability to tax, and "no power of supervision or control is lodged in either of the other departments of the government." *Pacific Insurance Co.*

v. Soule, 74 U.S. 95, 7 Wall. 433, 443 (1868). By the same token, even when the attempts of Congress to lay and collect taxes exceed its constitutional limits, the power of the judiciary to invalidate such attempts does not license the courts to, themselves, levy taxes, especially where it was clearly the intent of Congress to exempt the very object of the judicial levy. Severance of the invalid portion of the Act would be de facto judicial taxation which is unauthorized by the Constitution.

The federal government argues that, in the instant case, dictum in *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), controls the determination of severability. There, a power company challenged a state license tax on the manufacture of electricity, objecting to, among other things, a provision exempting the generation of electricity for irrigation purposes and requiring the power company to credit the exemption to consumers. The Court held that the exemption was not constitutionally infirm. As to the requirement that the exemption be credited to consumers, the Court said that its constitutionality depended on its application, that it did not appear that the power company was in danger of an unconstitutional application of the requirement, that the construction of this requirement was for the state court, and that it could not assume in advance that the construction adopted would be unconstitutional. *Id.* at 186. Nonetheless, the Court made the observation that if the exemption and credit provision *was* unconstitutional, it would be severable from the taxing provisions, since the primary object of the statute was plainly to raise revenue, and the exemption for electricity used to irrigate was secondary. *Id.* at 185. Even granting this attenuated dictum the force of precedent, the facts of this case are distinguishable. It is plain from the legislative history of the Act that the exemption for Alaska oil is not secondary, but rather, essential to the accomplishment of one of the Act's vital aims: to provide domestic production incentives.

The argument against judicial legislation is especially persuasive where, as here, the challenged statute is extraordinarily complex. The taxing provisions of the windfall profit tax legislation are, by themselves, complicated. They set forth categories of taxable crude oil, tax rates which vary according to the nature of the producer and the category of oil produced, "base prices" which vary in similar fashion, and tax offsets. *See* Brief for the United States at 2-5. The taxation system is structured on exceedingly complex federal crude oil price regulations which expired in 1981, the interpretation of which is still a subject of litigation. Certainly the complexities of the taxation system and the windfall profit tax legislation as a whole make this case an inappropriate one for judicial extension of the tax. "[W]here Congress . . . has enacted specific, carefully-tailored legislation, it would be inappropriate for a court to undertake piecemeal extensions of the principles reflected in this legislation merely because it is desirable, especially in view of the fact that Congress saw fit not to provide for these extensions." *United States v. General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675, 679 (2d Cir. 1972), cert. denied, 412 U.S. 922 (1973).

In the course of this challenge to the Act, the federal government has suggested to the courts three options for curing the invalidity of the Alaska exemption: extension of the tax to all Alaskan oil through severance, exemption of all newly discovered oil (*see* Brief for the United States at 50 n.46), and extension of the exemption to crude oil production from all areas similar to the Arctic Circle or located more than 75 miles from a pipeline connection (*see* Reply Brief for the Defendant United States and in Opposition to Motions for Summary Judgment of Plaintiffs and Intervenors, 10). The prohibition against judicial legislation applies to the latter two options as well as to extension of the tax. The federal government's suggestions show, however, the

options properly available to *Congress* to cure the Act. Unlike the courts, Congress can choose from a multitude of legislative actions, including modification of tax rates and base prices and exemptions of other crude oil which is difficult and expensive to produce. The remedy for this Act is best left to those who drafted and passed it and whose legitimate range of actions is most flexible.

Congress alone has the constitutional authority to tax. It has first-hand knowledge of the policy considerations which shaped the Act and the policy implications of extensions or modification of the tax. Congress is fully aware of the complexities of the tax, and Congress alone can cure the Act, taking into account all its complexities. For these reasons, the refusal of the district court to judicially legislate by severing the Alaska oil exemption is correct.

CONCLUSION

Title I of the Crude Oil Windfall Profit Tax Act of 1980 is unconstitutional because it is in violation of the geographic uniformity requirement of the Uniformity Clause. By exempting portions of Alaska from taxation, this statute discriminates in favor of Alaska and against the other states of the Union. That such discrimination between the states is prohibited by the Uniformity Clause is illustrated by the decisions of this Court. The Alaska exemption is a central feature of the Act and was necessary to the political compromise that produced this statute. As a result, the unconstitutionality of the exemption invalidates the entire Act.

For the reasons set forth above, the decision of the District Court should be affirmed.

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Activity due in Texas waters of Gulf of Mexico

Major exploration efforts and continued development are on tap next year in Texas waters of the Gulf of Mexico.

Action will be in shallow waters along the coast in the areas of Padre and Mustang islands. Projects include deep exploratory drilling in the North Padre Island area by ARCO Exploration Co. in its recently approved, 43,000 acre, "Project Monster Unit" off Kenedy County.

In addition, Genesis Petroleum Corp. plans to drill rank wildcats on as many as nine prospects in the South Padre-North Padre Island areas.

ARCO's plans. ARCO plans to spud its first unit wildcat about July 1983 in North Padre Island Block 960-L.

The wildcat, targeted probably to the middle Frio, is projected to 23,000 ft in 50-60 ft of water. A second test is tentatively planned for April 1985.

The Texas School Land Board approved the Project Monster Unit in October. The unit involves 34 leases, all with 5 year terms. Earliest expiration date is Apr. 1, 1985.

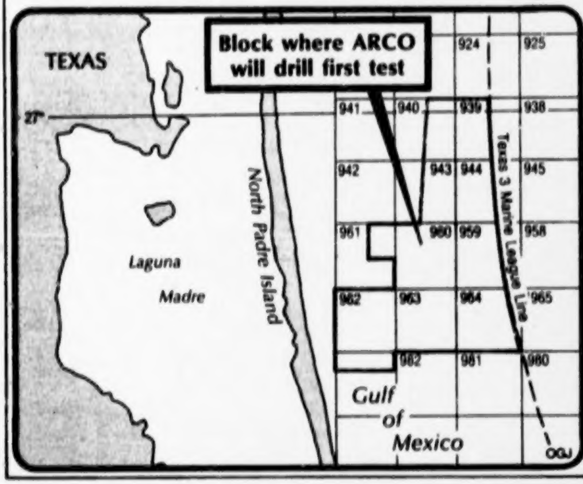
Water depths average 50-80 ft.

ARCO estimates dry hole costs on the first well at about $30 million. And it estimates another $20 million potential investment to evaluate and complete the well.

It acquired 100% interest in the acreage in state sales held Apr. 1, 1980; Oct. 7, 1980; and Apr. 6, 1982. All leases provide for 25% royalty to the state.

ARCO paid an average of $46/acre for the leases. Highest price paid was $90,720—$63/acre—for each of the 1,440 acre quarters of North Padre Island Block 960-L, acquired in the April 1980 sale.

ARCO's Project Monster Unit



Jack L. Keplinger, ARCO exploration manager, offshore region, said the July planned spud date might not be met for the first test because ARCO has to obtain special alloy pipe.

It plans to drill the acreage using one rig, possibly Marine Drilling Co.'s J Storm VII jack up.

Nearby, in federal waters, ARCO Oil & Gas Co. has gas production in about 122 ft of water from two platforms in North Padre Island Blocks 956 and 967 serving its Block 967 field.

ARCO owns 75% working interest and Transco Energy Co. 25% interest in the blocks.

Genesis plans wildcats. Genesis, which has one of the largest acreage positions in the South Padre-North Padre Island areas, plans to drill wildcats on eight or nine prospects, including some on adjacent federal acreage.

All wells will be 10,000 ft deep or less, testing the Miocene *Bigenerina humblei* and *Amphistegina* sands.

It plans soon to spud a test in the southeastern quarter of South Padre Island Block 1047-L.

The site is about 55 miles south of the block where ARCO will drill its first test.

It has under lease a little more than 30,000 net acres in state and federal waters in the area and has teamed with HNG Fossil Fuels Co., a Houston Natural Gas Co. subsidiary, in an exploration venture in the area.

Genesis selected the area for exploration because of the proximity to a 20 in., 68 mile pipeline operated by Valley Pipeline Inc., an HNG subsidiary. Gas comes ashore south of Corpus Christi. Valley is purchasing gas from McMoRan's South Padre Island Block 1064-L field nearby.

McMoRan has two platforms on the block.

Miocene production began in August 1981.

Production currently is running at about 26 MMcfd. •